Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1996

CECILIA YIN,

Petitioner,

v.

STATE OF CALIFORNIA; DARYLL TSUJIHARA; LINDA NICHOLSON; ROBERT CATALE; and TONY SUNSERI,

Respondents.

Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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37 pp

QUESTIONS PRESENTED

1. Whether the business necessity exception to the Americans with Disabilities Act's prohibition on medical examinations allows an employer to require a medical examination based on an employee's attendance record.

2. Whether the Fourth Amendment of the United States Constitution requires a warrant or similar judicial review before a state can require an employee to undergo a medical examination.

3. Whether, under the Fourth Amendment, the state's interest in requiring Ms. Yin to undergo a medical examination is sufficiently important to outweigh Ms. Yin's reasonable expectation of privacy.

4. Whether the medical examination requirement was "narrowly tailored" to "further" the state's interest in a productive and stable workforce as required under the Fourth Amendment.

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PETITION FOR WRIT OF CERTIORARI

Cecilia Yin respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 95 F.3d 864 (9th Cir. 1996), and is reproduced in the appendix at App. 1. The opinion and order of the district court is reproduced in the appendix at App. 17.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered September 11, 1996. This Court has jurisdiction to hear this petition pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent portion of the United States Constitution is the Fourth Amendment, which provides that:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized."

The pertinent provision of the Americans With Disabilities Act, 42 U.S.C. § 12112, provides that:

> "A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(c)(4)(A).

STATEMENT OF THE CASE

This case involves an attempt by Respondents to require Ms. Yin, a long-time employee of the State of California's Employment Development Department ("EDD"), to submit to an unwanted medical examination. The examination requirement was imposed after Ms. Yin took less than one day off on January 7, 1994 for menstrual pain. The state's procedure for obtaining a medical examination requires justification from line management. The sole "justification" asserted by Ms. Yin's supervisor in his request for the examination was purported "dizziness"--a claim he pointedly did not attest to in his declarations below. After Mr. Sunseri submitted his request, Respondents attempted to beef up their "justification" with references to two unrelated bouts of illness Ms. Yin had in 1993. However, Ms. Yin had not used any leave time for two months.

Ms. Yin brought suit, contending that the examination requirement violates both the Americans with Disabilities Act ("ADA") and the Fourth Amendment (as made applicable to the states by the Fourteenth Amendment). The district court granted summary judgment in favor of Defendants on the grounds that: 1) there was no ADA violation because the examination met the "business necessity" exception to the ADA's prohibition against

requiring medical examinations; and 2) based on that finding, there was no triable issue of fact regarding Plaintiff's allegation that her privacy rights under the United States Constitution had been violated.

The Ninth Circuit affirmed, holding that, based on Ms. Yin's attendance record, 1) the examination met the "business necessity" exemption of the ADA's prohibition against requiring medical examinations; 2) the examination was not subject to the warrant requirement of the Fourth Amendment, 3) the examination would further the State's interest in assuring a productive, stable workforce, and that that interest was a "substantial and weighty"government interest, and 4) the examination requirement was constitutional based on a balancing test between Plaintiff's privacy interest and the State's interest in maintaining a productive and stable workforce. The Ninth Circuit rightly rejected Respondents' claimed justification based on the unsupported claim of "dizziness."

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision below guts the ADA's prohibition against employers requiring medical examinations for the purpose of finding out if an employee is disabled. This appears to be the only decision to date construing the "business necessity" exception to the ADA's prohibition against medical examinations. Its precedent seriously diminishes the protection against intrusive medical examinations Congress sought to provide to workers.

A significant Constitutional right is also at stake: the right to be free from unreasonable government searches. The state brings the full weight of its legislative powers to bear in claiming virtually unfettered access to its employees medical information. In doing so, it also claims the right to require its employees to undergo intrusive medical exams anytime one of its managers, in his or her broad discretion, wants to "evaluate the capacity of the employee to perform the work of his or her position." See, Cal. Gov't. Code,

§ 19253.5. It is just this kind of abuse of governmental power that is prohibited under Skinner v. Railway Labor Executives Ass'n (1989) 489 U.S. 602.

Finally, the Ninth Circuit's decision below merits review because it directly conflicts with both prior Supreme Court precedent and a recent decision from the Tenth Circuit on the issue of medical searches of governmental employees.

I. THE NINTH CIRCUIT'S ANALYSIS ALLOWS THE "BUSINESS NECESSITY" EXCEPTION TO SWALLOW THE ADA'S RULE AGAINST REQUIRING MEDICAL EXAMINATIONS.

The examination requirement imposed on Ms. Yin violates the Americans With Disabilities Act (the "ADA), 42 U.S.C. § 12112, because it was imposed for the purpose of determining the existence or extent of a disability, and it should not be deemed to fit within the "business necessity" exception to the prohibition against such examinations. The ADA provides:

> "A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(c)(4)(A).

Respondents claim that, because of Ms. Yin's "above average use of sick leave and recent dizzy spells," they are entitled to require her to submit to a medical exam. The factually unsupported claimed basis of "dizzy spells" was rightly rejected by the Ninth Circuit. Allowing the claim of above average sick leave to trigger the "business necessity" exception would allow the exception to swallow the rule.

In it's interpretive guidelines, the EEOC clarifies that the "business necessity" exception exempts common "fitness for duty"

examinations, such as are required of truck drivers and pilots.[1] 29 C.F.R. Pt 1630, Appendix, § 1630.14(c). Such exams are permitted "when there is a need to determine whether an employee is still able to perform the essential functions of his or her job." Ibid. (emphasis added). The purpose of this exception is preserve the ability to ensure that all employees of a certain class--such as pilots--can meet minimum physical standards (sight, strength, endurance, etc.), *not* ad hoc exams to determine whether a specific employee is "disabled."

Here, there is no "need" to determine whether Ms. Yin can perform "essential functions" of her job.[2] Respondents claimed the required "need" arises from Ms. Yin's "excessive absenteeism." However, Respondents made no showing whatsoever that any given level of attendance is an "essential function" of Ms. Yin's job.[3] Thus, the medical examination requirement violates the ADA.

II. THE NINTH CIRCUIT'S ANALYSIS OF THE WARRANT REQUIREMENT DISREGARDS CLEAR SUPREME COURT PRECEDENT AND CONFLICTS WITH THE TENTH CIRCUIT.

A medical examination is a search subject to the Fourth Amendment. Skinner 489 U.S. at 605. The Fourth Amendment, which is made applicable to the states by the Fourteenth Amendment, applies to governmental action, even when the government is acting as an employer. Skinner 489 U.S. 602. Except in certain well-

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[1] This exception also allows exams in connection with a reasonable accomodation process. That purpose is not implicated because Ms. Yin does not need any such accomodation, and declined Respondents offer of one.

[2] The only "essential function" cited in the Motion for Summary Judgment is the ability to do field audits. (E.R. A 00523-24). But no facts were cited that show a "need" to determine if Ms. Yin can still perform field audits.

[3] On the contrary, the state provides an large amount of leave to Ms. Yin: 18 days of vacation time per year, which can accrue up to 400 hours; and 12 days of sick leave per year, for which there is *no* limit as to the amount that may be accrued. In addition, beginning in 1993, she was given an *extra* 12 days per year of "personal time" in exchange for a 5% pay cut. (E.R. A 00498-99) and (E.R. A 00466-67). Strict attendance is thus not "essential" to her job.

defined circumstances, a search is not considered "reasonable" for Fourth Amendment purposes unless it is done pursuant to a judicial warrant issued on probable cause. Skinner, 489 U.S. at 619. The Court has recognized limited exceptions to the warrant and probable cause requirements when "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement *impracticable*.'" Ibid. (emphasis added).

In Skinner the Court found the exception applied because it involved drug-testing of railroad employees engaged in safety-sensitive tasks after either major train accidents or incidents, or after a violation of safety rules. The Court noted that the warrant procedure would frustrate the regulatory purpose because drugs are eliminated from the system at a constant rate, so samples must be taken quickly. The Court also recognized that although the Fourth Amendment applied due to the pervasive regulation of the railroads, the Railroad's management did not have experience in obtaining warrants. Finally, the Court noted that the safeguards provided by a warrant were less necessary because the challenged regulations provided little or no discretion to the employer in determining which employees would be tested. Id. at 621-25. Similarly, in Vernonia School Dist. v. Acton, 515 U.S. ___ 132 L. Ed. 2d 564 (1995), the Court noted that the warrant requirement "'would unduly interfere with the maintenance of the swift and informal disciplinary procedures (that are) needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'" Id, at 574.

None of the above factors are present in this case: there was no time urgency that would make it impractical to obtain warrant or other judicial review. The triggering event occurred on January 7, 1994, and the medical exam requirement was not imposed until February 1, 1994. (See, E.R. A 00496-97) and E.R. A 00427, A 00457). Nor is this employer--the State of California--inexperienced with obtaining warrants. Finally, unlike the situation in Skinner, Respondents give themselves *broad* discretion in deciding

who must submit to an examination. (See, E.R. A 00423-57). The Fourth Amendment's requirement that the government obtain judicial review *before* conducting a search was designed to prevent just this kind of unbridled discretion. See, Id. at 621-22. The concerns regarding schools in Vernonia are, of course, inapplicable here.

The Ninth Circuit's approach is in direct conflict with that of the Tenth Circuit. The Ninth Circuit declares that medical tests that are not done as part of a criminal investigation are "generally" not subject to the warrant requirement of the Fourth Amendment. The Tenth Circuit, in Rutherford v. Albuquerque (10th Cir. 1996) 77 F.3d 1258, expressly acknowledges the applicability of the warrant requirement to medical testing of government employees. Both the Ninth and Tenth Circuits rely on Skinner and Vernonia in reaching their conclusions. Certiorari is appropriate to resolve this conflict among the circuits, and provide guidance on an sensitive issue affecting the rights of millions of public employees.

The state had the time and know-how to obtain judicial review before requiring such a highly intrusive search. Under Skinner, their failure to do so violates the Fourth Amendment.

III. THE STATE'S PURPORTED INTEREST IN OBTAINING A MEDICAL EXAMINATION IS NOT SUFFICIENTLY IMPORTANT TO OUTWEIGH MS. YIN'S EXPECTATION OF PRIVACY.

In the present case, the contemplated search is highly intrusive of Ms. Yin's privacy, and thus the government interest required to outweigh her privacy interest must be compelling. See, Skinner, 489 U.S. at 628; Vernonia, 132 L.Ed. at 579; Thorne v. City of El Segundo (9th Cir. 1983) 726 F.2d 459, 469 ("The more fundamental the rights on which the state's activities encroach, the more weighty must be the state's interest . . ."). In Vernonia the intrusion involved only a urine test. Here, the intrusion involves a "complete physical examination" including an inspection of all vital signs and systems that make up the body. (see, E.R. A 00398-00399). The doctor anticipated checking for problems with blood

pressure, blood sugar, head trauma, eye disease, ear disease, and heart irregularities. Ibid. At a minimum, the examination would require Ms. Yin to allow blood to be drawn from her veins, and to allow an unknown doctor to examine her with his hands and various medical instruments, while she is only partially dressed at best.[4]

The Ninth Circuit held that Ms. Yin has a diminished expectation of privacy because of the state's statute allowing these kind of medical exams, and the collective bargaining agreement containing a similar provision that was negotiated in the shadow of that statute. This analysis begs the question. The Ninth Circuit acknowledged that a State should not be allowed to "eliminate basic Fourth Amendment protections and effectively amend the Constitution in the process by enacting statutes authorizing particular searches or seizures." Yin, 95 F.3d 864; 1996 U.S. App. LEXIS at 17. Yet this is precisely what the Ninth Circuit allows the State to do, reasoning that the State should be treated no different than any other employer and its employees' expectations are no different that other employees' expectations. Yin, 95 F.3d 864; 1996 U.S. App. LEXIS at 18-19. This reasoning is divorced from both the facts and the law. Public sector employees are traditionally treated differently than private sector employees in a number of respects, and public employees have ample reason to have a much higher expectation of protection in their jobs than private employees. In any event, there is no reason to find a diminished expectation of privacy for California's tax auditors any more than any other clerical position. The present case presents none of the characteristics of a "diminished expectation of privacy" such as were cited regarding the student

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[4] While the Ninth Circuit accepted Respondents' claim that the examination would not include a vaginal examination, the record below does not support this claim. The Declaration of Matthew Duncan, M.D. states what procedures he uses when asked to evaluate dizziness (E.R. A 00398-00399)--a condition that the evidence below showed Ms. Yin was not suffering from (other than in connection with an viral infection that occurred eight months earlier (E.R. A 00013-00017). Nowhere does Dr. Duncan state how he would evaluate painful menstruation--a condition Ms. Yin's supervisor expressly asked to have evaluated when he first sought a medical examination. (E.R. A 00529).

athletes in the Vernonia case.

The state's interest in maintaining a productive, stable workforce is not sufficient to justify the intrusion into Ms. Yin's privacy, and her very body, contemplated by the examination requirement. Moreover, as discussed below, the requirement is not narrowly tailored to further the state's purported interest.

IV. THE EXAMINATION REQUIREMENT IS NOT "NARROWLY TAILORED" TO "FURTHER" THE STATE'S PURPORTED INTEREST AS REQUIRED BY THE FOURTH AMENDMENT.

The medical examination requirement will not "further" the state's purported interest and is not "narrowly tailored" in any event. As the Ninth Circuit noted, in order to satisfy the Fourth Amendment a search must further a state interest. Yin v. State of California (1996) 95 F.3d 864; 1996 U.S. App. LEXIS 23903, 22-23. Yet the Ninth's Circuit fails to analyze how a medical exam "furthers" the State's interest, other than to state in conclusory terms that "Under the circumstances, requiring Yin to undergo an independent medical examination would clearly further the state's interest in assuring a productive and stable work force." Yin, 95 F.3d 864; 1996 U.S. App. LEXIS 23903, 24. The state had a full record of Ms. Yin's attendance history. A medical exam does not change an employee's physical condition, and cannot improve his or her attendance. Submitting to a medical exam will not affect Ms. Yin's productivity, "stability," or attendance. The *only* conceivable connection is that her supervisors could use the information to determine whether her employment should be terminated. However, that determination can be made without any medical exam, based on Ms. Yin's attendance record. Of note, the only written reprimand given to Ms. Yin regarding her use of sick leave mentions *nothing* about her attendance (E.R. A 00042-00043). Instead, it reprimanded her for purportedly being absent without leave, which claim was wholly refuted below, without dispute by Respondents.

The state's interest in maintaining a productive, stable

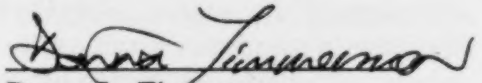
workforce can be adequately met through personnel policies that require reasonable medical verification of the need to use sick leave, and that allow dismissal of workers who do not maintain adequate attendance levels. The state has a policy requiring medical verification, including the general nature of the illness and the prognosis, for absences of more than 2 days. Ms. Yin complied with this policy, and with specific requirements that were placed on her to provide such verification for all absences. The state also can discipline or dismiss an employee who uses excessive sick leave.

Finally, although Ms. Yin believes that requiring a release of medical records would also be an unreasonable search under, it would nonetheless be a less intrusive, more narrowly drawn, requirement. It is one that the state has admitted would suffice (E.R. A. 00527), but that it never imposed. The question in this case is whether the *examination* requirement was sufficiently narrow to further the state's interest. Thus, regardless of whether other personnel policies are deemed satisfactory alternatives to meet the state's interest, the existence of the alternative of requiring a release of medical records shows that the examination requirement was not narrow enough to satisfy the Fourth Amendment.

CONCLUSION

For all of the above reasons, petitioner asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this matter.

Dated: December 7, 1996 Respectfully submitted,



Donna L. Timmerman
Attorney for Petitioner,
Cecilia Yin

APPENDIX A

CECILIA YIN, Plaintiff-Appellant,
v.
STATE OF CALIFORNIA; DARYLL TSUJIHARA; LINDA NICHOLSON; ROBERT CATALE; and TONY SUNSERI, Defendants-Appellees.

No. 94-17057

United States Court of Appeals, Ninth Circuit

September 11, 1996, OPINION

COUNSEL: Donna Timmerman, San Jose, California, for the plaintiff-appellant; Angela Botelho, Deputy Attorney General, San Francisco, California, for the defendants-appellees.

JUDGES: Before: Stephen Reinhardt, David R. Thompson, and Diarmuid F. O'Scannlain, Circuit Judges. Opinion by Judge Reinhardt; Special Concurrence by Judge O'Scannlain.

OPINION BY: STEPHEN REINHARDT
OPINION: REINHARDT, Circuit Judge:

The question before us is whether the state may compel an employee with a prolonged and egregious history of absenteeism and a record of on-the-job illnesses to undergo a fitness-for-duty medical examination. California's civil service statute specifically authorizes such tests, as does the employee's union contract. The employee claims that requiring her to submit to an unwanted medical examination would violate both the American with Disabilities Act (the ADA), 42 U.S.C.§ 12101 et seq. and the Fourth Amendment. We disagree on both counts.

Background

The plaintiff, Cecilia Yin, works as a tax auditor for the State of California Employment Development Department. For five years before the commencement of this action, Yin used sick leave, vacation time in lieu of sick leave, and dock time in lieu of sick leave at rates far in excess of the average for tax auditors. The record shows the following: In 1989 and 1990, due to illness Yin missed approximately two and one half times as much work as the average auditor. In 1991, she missed about 20% more work, and in 1992 and 1993 respectively, she missed five and six times as much. She missed nearly four full months of work in 1993. Because of her excessive absenteeism, Yin's overall productivity, whether measured in terms of the numbers of audits completed or additional tax liability found, was less than any or almost any of the other auditors working out of the San Jose district office for four straight fiscal years, from 1989 to 1993.

In May 1993, when Yin returned to work from yet another absence, one of her supervisors requested that she provide a copy of her medical records. Yin refused, and after several more absences, her supervisor asked her to submit to an independent medical examination to be administered by a doctor selected by the state. Again Yin refused, and this time she retained a lawyer. The state dropped its request, saying Yin's condition had stabilized. In February 1994, after several more absences, including one stretch during which Yin missed almost 30 days in a row, the state again demanded that Yin submit to an independent medical examination. This time Yin filed suit to keep the state from requiring her to release her medical records, submit to an examination, or discipline her for refusing to do so.

On summary judgment, the district court ruled for the state on all claims. The court held that even if the requested examination were for the purpose of determining whether or not Yin was disabled, a purpose that is normally prohibited by the ADA, it would be exempt from the prohibition because it fell under the business necessity

exception.[1] The court also held that the requirement that Yin submit to the examination did not violate her Fourth Amendment rights. This appeal ensued.[2]

Medical Examinations, the ADA and the Business Necessity Exception

The ADA was enacted in 1992 "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[3] The act drew heavily upon the language and structure of the Rehabilitation Act of 1973, which prohibits discrimination against handicapped individuals employed by the federal government or in federal programs. In sections 12201(a) and 12133 of the ADA, Congress directed that interpretations of the ADA incorporate Rehabilitation Act precedent.

Section 12112(d)(4)(A) of the ADA provides that covered entities shall not require medical examinations of their employees for the purpose of determining "whether such employee is an individual with a disability or as to the nature and severity of the disability" unless the examination "is shown to be job-related and consistent with business necessity". This court has not yet construed this section in general or the scope of its business necessity exception in particular.[4] We have, however, in one case, considered the definition of business necessity as used in regulations implementing

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[1] 42 U.S.C.§ 12112(d)(4)(A) says: "A covered entity shall not require a medical examination and shall not make medical inquiries of an employee as to whether such an employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity."

[2] Because Yin claims that the medical examination was requested for a prohibited purpose, she falls within the zone of interest protected by the statute and thus has standing to bring this action. See Valley Forge Christian College v. Americans for Separation of Church and State, Inc., 454 U.S. 464, 474-75, 70 L. Ed. 2d 700, 102 S. Ct. 752 (1982).

[3] 42 U.S.C. 12101(b).

[4] The ADA was adopted in 1990 and took effect in 1992.

the Rehabilitation Act. That case is not of much assistance here.[5]

Like the district court, we assume for the purpose of our analysis that a goal of the proposed medical examination was to determine whether Yin was "an individual with a disability or . . . the nature or severity of [her] disability" and that the proposed examination is subject to 42 U.S.C.§ 12112(d)(4)(A). Even with that assumption, we conclude that in light of the business necessity exception the ADA does not prohibit the state from requiring Yin to undergo the requested medical examination.

There is no question that the proposed medical examination was job-related. The record clearly indicates that Yin's supervisors had good cause for trying to determine whether she was able to perform her job. Yin had missed an inordinate number of days at work. The undisputed facts show that Yin's excessive absenteeism had taken a serious and deleterious toll on her productivity and overall job performance.[6] There is nothing in the record to suggest that her supervisors were simply trying to discover whether she suffered from a particular disability or that they harbored either a special bias against individuals with a given disability or a general bias against all persons with disabilities.

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[5] Bentivegna v. U.S. Dept. of Labor, 694 F.2d 619 (9th Cir. 1982), considered whether an employee with diabetes could be fired merely because the employer believed the employee's blood sugar level was not under control and that the employee was thus more prone than the average employee to health problems. In the course of the opinion, we interpreted 29 C.F.R.§ 32.14 (1982), which provides that job qualifications "which would tend to exclude handicapped individuals because of their handicap . . . shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safe performance." We noted that "business necessity is not to be confused with mere expediency." Id. at 622. See also Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985) (quoting "mere expediency" language from Bentivegna).

[6] The district court reached a similar conclusion, stating: "Although Plaintiff contends that the Defendants here have not made such a showing of 'business' necessity, the Court disagrees. The declarations of Tony Sunseri and Robert Catale set forth in detail Plaintiff's excessive absenteeism rate and the effect such absenteeism has on the work load of both Plaintiff and her office."

Moreover, according to the record before us, there is no doubt that Yin's supervisors' ultimate purpose was only to try to determine whether Yin was capable of doing her job. Although the terms of the statute and the interpretive regulations are far from clear, we do not believe that Congress intended as sweeping a ban on employee medical examinations as appellant suggests.[7] We conclude that when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability.[8] If such an examination is governed by the provisions of § 121112 (d)(4)(A), it is covered by the business necessity exception.

Medical Examinations and the Fourth Amendment

Yin also claims that defendants' insistence that she undergo an independent medical examination constitutes a violation of her Fourth Amendment right to be free from unreasonable searches and

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[7] The interpretive regulation covering medical examination discusses an example that is similar in some respect to the case before us. However, in the end the discussion is of little or no help and the interpretation leaves us exactly where we were before. See 29 C.F.R. Pt. 1630 App. (Interpretative Guidance on Title I of the Americans with Disabilities Act). "The purpose of this provision is to prevent the administration to employees of medical tests or inquiries that do not serve a legitimate business purpose. For example, if an employee suddenly starts to use increased amounts of sick leave or starts to appear sickly, an employer could not require that employee to be tested for AIDS, HIV infection, or cancer unless the employer can demonstrate that such testing is job-related and consistent with business necessity." Id. at § 1630.13(b).

[8] Yin claims that she would be subjected to a vaginal examination as part of the requested independent medical examination. She does not, however, provide any evidence to that effect and the state vehemently denies her contention. As evidence, the state offered a declaration from Dr. Duncan, the doctor that the state wanted to examine her. In his declaration, the doctor said that in cases of dizziness, the condition from which Yin was suffering, he does not perform a pelvic examination. Accordingly, we conclude that there is no material dispute of fact as to the scope of the examination.

seizures. Yin further argues that the state must secure a warrant before it can compel her to submit to a medical examination. We reject both contentions. Although a search or seizure is usually not considered to be consistent with constitutional requirements unless it is conducted pursuant to a warrant issued upon probable cause, Vernonia School Dist. 47J v. Acton, 132 L. Ed. 2d 564, 115 S. Ct. 2386, 2390-91 (1995); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989), neither probable cause nor a warrant is required when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." Vernonia, 115 S. Ct. at 2391 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873, 97 L. Ed. 2d 709, 107 S. Ct. 3164 (1987) (internal quotation marks omitted)). In "special needs" cases, a category that includes criminal and civil proceedings, the Court dispenses with the probable cause and warrant requirements and simply applies a balancing test to determine if a search or seizure is reasonable and thus constitutional. See O'Connor v. Ortega, 480 U.S. 709, 725, 94 L. Ed. 2d 714, 107 S. Ct. 1492 (1986) (plurality) (holding neither the warrant requirement nor the probable cause requirement should apply to "non-investigatory, work-related purposes," or "for investigations of work-related misconduct . . .); see also New Jersey v. T.L.O., 469 U.S. 325, 83 L. Ed. 2d 720, 105 S. Ct. 733 (1985) (upholding warrantless search of student's purse because of need to maintain discipline in schools).

Medical examinations and medical tests that are not conducted as part of a criminal investigation are generally subject to the balancing test, not the warrant/probable cause requirement. Vernonia, 115 S. Ct. at 2391; Skinner, 109 S. Ct. at 1414-15; National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665, 103 L. Ed. 2d 685, 109 S. Ct. 1384 (1989). The medical test at issue here, if justified at all, "serves special governmental needs [ ] beyond the normal need for law enforcement . . ." Thus, we reject Yin's claim that the state must secure a search warrant before requiring her to submit to a medical examination.

In several special needs cases, the Court has concluded that "in limited circumstances" a warrantless search or seizure may be reasonable even absent individualized suspicion. See Von Raab, 489 U.S. at 668 ("We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."); Skinner, 489 U.S. at 624 ("In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."). We do not have to decide here, however, whether the state could compel Yin or its other employees to submit to a medical examination without individualized suspicion, because as we explain below, individualized suspicion clearly exists in Yin's case.[9]

Under the balancing test, the Court determines if a search is reasonable by weighing the privacy interests of the individual against the government's interest in the search. Vernonia, 115 S. Ct. at 2390. Notwithstanding Yin's assertion to the contrary, the government does not have to use the least restrictive means to further its interests. Vernonia, 115 S. Ct. at 2396 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment.") Nor must the government establish a "compelling state interest," in the sense of an absolute quantum of interest, to justify the search or seizure. As Justice Scalia explained in Vernonia: It is a mistake, to think that

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[9] California statute § 19253.5 says the state "may require an employee to submit to a medical examination by physician or physicians . . . to evaluate the capacity of the employee to perform the work of his or her position." Id. at (a). The statute does not specify whether the state must have an individualized suspicion before requesting an independent medical examination. In this case the union contract limits the application of the statute to situations in which the state has an individualized suspicion. The contract says, in pertinent part, that the state may require a medical examination "whenever the State believes that an employee, due to illness or injury, is unable to perform his/her normal work duties."

the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering the question: Is there a compelling state interest? Rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Id. at 2394-95.

Yin's Privacy Interest

Requiring someone to submit to a medical examination invades an expectation of privacy that "society is prepared to consider reasonable," Ortega, 480 U.S. at 715, and thus clearly implicates the Fourth Amendment. The Court has previously held that blood tests, urinalysis, and breathalyzer tests are searches implicating Fourth Amendment rights. Skinner, Von Raab, Schmerber v. California, 384 U.S. 757, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966).

In Skinner, the Court also said the act of drawing blood itself, even if the blood is not subsequently analyzed for the presence of illegal drugs, implicates the Fourth Amendment: In light of our society's concern for the security of one's person, see, e.g. Terry v. Ohio, 392 U.S. 1, 9, 88 S. Ct. 1868, 1873, 20 L. Ed. 2d 889 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further intrusion of the tested employee's privacy interests. Skinner, 489 U.S. at 616. Similarly in Vernonia, the Court said that both the collection of a urine sample, as well as its subsequent analysis, are invasions of societally-sanctioned expectations of privacy. Vernonia, 115 S. Ct. at 2393.

Supreme Court precedent clearly dictates that any medical examination that entails a blood or urine test triggers, at a minimum, the Fourth Amendment balancing test. In today's world, a medical

examination that does not include either a blood test or urinalysis would be unusual. Nonetheless, any such medical examination would still implicate the Fourth Amendment.[10] The Court held in Terry v. Ohio, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968), for instance, that even a brief detention and frisk constitutes a search or seizure under the Fourth Amendment. Id. at 16. A physical examination by a doctor, with or without the taking of bodily fluids, is surely far more intrusive.

We have previously held that individuals have a right protected under the Due Process Clause of the Fifth or Fourteenth Amendments in the privacy of personal medical information and records.[11] Thus in addition to implicating the Fourth Amendment, forcing employees to submit to a medical examination would implicate their rights under the Due Process Clause because such an examination would inevitably reveal private medical information. We do not believe, however, that it would make sense to divide medical examinations into two categories - those that implicate the Fourth Amendment and those that implicate the Due Process Clause of the Fifth or Fourteenth Amendment - or to examine such intrusions

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[10] There are other procedures that are also intrusive: for example a doctor's use of a tongue depressor to permit him to look down a patient's throat; or an instrument that permits him to peer into a patient's ears; or a doctor's direction to a patient to partially undress.

[11] See Doe v. Attorney General of U.S., 941 F.2d 780, 795-96 (9th Cir. 1991) (holding that individual has privacy interest in medical information, including diagnosis); see also U.S. v. Westinghouse Elec. Corp., 638 F.2d 570, 577 (3rd Cir. 1980) ("There can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection.").

In Whalen v. Roe, 429 U.S. 589, 604 n.32, 51 L. Ed. 2d 64, 97 S. Ct. 869 (1977), the Court relied on the Due Process Clause of the Fourteenth Amendment, in finding a privacy interest in medical records and specifically concluded that the privacy right in that case was not protected under the Fourth Amendment. Whalen, however, involved a constitutional challenge to a state law requiring physicians to report the name, address and age of every patient to whom they prescribe a narrow group of drugs with both legal and illegal uses, not an actual examination of the person himself.

under two different approaches. Because various types of medical tests and examinations have already been classified as implicating the Fourth Amendment, we believe that all such tests and examinations should be analyzed under the rubric of that Amendment.[12]

Accordingly we conclude that Yin does have a legitimate expectation of privacy in being free from an unwanted medical examination, whether or not that examination entails any particularly intrusive procedures.[13] Thus we determine that the Fourth Amendment is implicated here.

Yin's Expectation of Privacy

Although Yin has a societally-recognized expectation of privacy in not being subjected to a medical examination, several factors diminish - but do not extinguish - that expectation. We consider those factors in turn: Yin's status as an employee; a state statute permitting testing of civil service employees; a union contract incorporating the statute; and Yin's record of extended and egregious absenteeism.

Like any employee, Yin has a somewhat reduced expectation of privacy in the workplace, O'Conner v. Ortega, 480 U.S. at 709, as well as vis-a-vis her employer, id. at 717 ("The employee's expectation of privacy must be assessed in the context of the employment relation."). See also Vernonia, 115 S. Ct. at 2391 ("The legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State.").

More important in this case is a California statute that explicitly authorizes medical examinations of state civil service employees such as Yin. That statute serves to put Yin on notice that she can be subjected to an independent medical examination, at least under some

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[12] We do not, however, foreclose the possibility that in particular circumstances, a due process inquiry may be appropriate as well.

[13] See n.8 supra.

circumstances,[14] and diminishes her expectations of privacy accordingly. Although there is little direct case law on point, obviously there are limitations on the state's ability to erode reasonable expectations of privacy by statutory enactments. Otherwise, Congress and state legislatures could eliminate basic Fourth Amendment protections and effectively amend the Constitution in the process by enacting statutes authorizing particular searches or seizures. For example, Congress could not eviscerate the right of the people to be secure in their homes by passing a law permitting federal agents to enter houses at will, without a warrant or probable cause.

This case, however, does not require us to draw a dividing line between lawful statutes that permissibly diminish legitimate expectations of privacy and unconstitutional statutes that impermissibly do so. We note that although the California statute has been on the books for nearly 40 years and is invoked regularly,[15] it has not been the subject of a Fourth Amendment challenge in any reported case. The state, acting here in its role as an employer, is not asserting a new or singular prerogative. It is simply exercising a prerogative that has been traditionally accorded to private employers and that those employers have neither permitted to fall into desuetude nor have progressively abandoned.[16] In short, the state is simply acting like a typical employer, and the expectations of its employees are, in this case at least, no different from those of private employees. Finally, there is no suggestion that the state enacted the

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[14] Cal. Government Code § 19253.5 (West 1995) provides: "(a) In accordance with board rule, the appointing power may require an employee to submit to a medical examination by a physician or physicians designated by the appointing power to evaluate the capacity of the employee to perform the work of his or her position."

[15] According to the state, 10 employees in the Employment Development Department, the department in which Yin worked, were required to submit to an independent medical examination in 1993 alone.

[16] See, e.g., William J. Hollway and Michael J. Leech, Employment Termination: Rights and Remedies 441 (2d ed. 1993) (noting that testing of employees has been relatively common at least since the 1940s).

statute in question in an effort to undermine the Fourth Amendment.

The collective bargaining agreement covering state employees such as Yin also provides for independent medical examinations "whenever the State believes that an employee, due to illness or injury, is unable to perform his/her normal work duties."[17] It is clear that a contract may under appropriate circumstances diminish (if not extinguish) legitimate expectations of privacy.[18] While Yin was not actually a signatory to the collective bargaining agreement, the agreement nonetheless lessens her privacy expectation because it was negotiated by the union on behalf of all employees, including Yin, and represents the contractual agreement governing their working conditions.[19]

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[17] The contract between the state and Yin's Union provides in § 9.7 for Independent Medical Examinations as follows:

"a. Whenever the State believes that an employee, due to illness or injury, is unable to perform his/her normal work duties, the State may require the employee to submit to an independent medical examination at State expense. The medical examination will be separate of any medical services provided under the State's Worker's Compensation program.

b. The purpose of such independent medical evaluation is not to determine the degree of disability the employee has suffered, but rather as to whether illness or injuries sustained restrict the employee from performing the full range of his/her normal work assignment.

c. If the State, after the independent medical examination, determines that the employee cannot perform his/her normal work assignments, the State shall give the employee the opportunity to challenge the State's medical evaluation by supplying his/her personal medical evaluations to dispute the State's findings."

[18] See Zap v. United States, 328 U.S. 624, 90 L. Ed. 1477, 66 S. Ct. 1277 (1946) (contractor agreeing to allow government inspection of his books in order to get a government contract lost a claim to privacy that he would otherwise possess); First Alabama Bank of Montgomery, N.A. v. Donovan, 692 F.2d 714 (11th Cir. 1982) (rejecting application of Fourth Amendment standards to bank that contracted to allow the government to perform compliance reviews).

[19] The state does not argue that Yin has consented to this medical search just because her union has agreed in general that some medical searches may be appropriate. Accordingly, we do not consider whether Yin can be said to have consented to this search.

Finally, Yin's own experiences at the work-site have led to a diminution in her legitimate expectation of privacy. Not only has she missed an inordinate number of days due to illness, she has also experienced repeated episodes of on-the-job illness. She has suffered from fainting spells and other ailments, requiring her to place her head down on her desk or to go home early. On one occasion, she was even transported by ambulance from work to the hospital. The status of Yin's health, normally a matter that is primarily or solely of private concern, has been converted into an issue of legitimate concern for her supervisors, because it bears closely on her ability to perform her job.

We conclude that the state civil service statute, the union contract, Yin's status as an employee, and her unfortunate attendance record taken together have sharply reduced Yin's legitimate expectation of privacy vis-a-vis her employer.[20]

The Government's Interests

To determine the constitutionality of the search at issue, we must balance the government's interest in requiring Yin to submit to a medical examination against Yin's diminished expectation of privacy. The government must not only have a legitimate interest, the search or seizure at issue must further that interest. As the Court said in Vernonia, application of the balancing test requires not only considering the degree of intrusiveness and the state's interests in requiring that intrusion, but also "the efficacy of this [the state's] means for meeting" its needs. Vernonia, 115 S. Ct. at 2394. In this case, the government claims it has two distinct reasons for requiring Yin to submit to a medical examination: (1) its interest in guaranteeing a stable, reliable and productive work force; and (2) its interest in ensuring public safety as well as Yin's safety.

The government clearly has a valid concern with the productivity

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[20] The state assured Yin that her medical records would be held in strictest confidence, as required by state policy, with access limited to the department's Medical Director. Yin did not challenge that assurance.

and stability of its work force. Citizens rightly expect the government to operate as effectively and efficiently as it can, given the diverse tasks with which it is charged. The government cannot operate with any degree of efficiency if its employees miss work as frequently as Yin has. Regular performance of her work is a prerequisite for Yin's job, and for most if not all full-time governmental jobs. Cf. Von Raab, 489 U.S. at 670 (government has legitimate interest in ensuring front-line customs employees are "physically fit").

As a result of Yin's excessive absenteeism, not only has her own productivity dropped dramatically, but the productivity and morale of the office as a whole has declined. When Yin misses work because of unscheduled absences, other workers are forced to rearrange their schedules to complete pressing tasks for her. Thus, Yin's supervisors have valid cause for concern.

Given her sporadic attendance record, Yin's supervisors clearly had good reason to question her ability to perform her duties. Yin's supervisors requested that Yin undergo an independent medical examination only after she refused to provide them with a copy of her medical records. By asking Yin to submit to such a test, Yin's supervisors were seeking otherwise unavailable information that would help them determine whether Yin would be able to do her job properly. Under the circumstances, requiring Yin to undergo an independent medical examination would clearly further the state's interest in assuring a productive and stable work force. Accordingly, we conclude that the search at issue in this case serves a substantial and weighty government interest.[21]

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[21] The state also argues that it was concerned about Yin's ability to drive safely because of her alleged bouts of dizziness and was therefore acting to preserve public safety as well as Yin's welfare. Because we conclude that the state's interest in assuring a productive work force is sufficient to justify requiring Yin to take a medical exam, we do not need to reach the merits of the state's second asserted interest. We note, however, that we have serious questions whether the state's second reason is sufficient to support a reasonableness finding. There is no evidence in the record that Yin ever had an accident, whether while driving for the state or otherwise. Moreover, unlike in

Balancing Yin's diminished expectations of privacy against the state's interest in maintaining a productive and stable work force, we conclude that the state's request that Yin submit to an independent medical examination is reasonable and therefore constitutional.

Conclusion

The district court's opinion is AFFIRMED.

CONCUR BY: DIARMUID F. O'SCANNLAIN
CONCUR: O'SCANNLAIN, Circuit Judge, specially concurring:

I certainly agree that the State did not violate Yin's Fourth Amendment rights by requiring her to undergo an independent medical examination. I would raise a flag of caution, however, about the court's expansive statement that all medical examinations implicate the Fourth Amendment, whether or not the examination entails any particularly intrusive procedures.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. amend IV. Before we apply the reasonableness standard, the event at issue must constitute a "search" or a "seizure." The Supreme Court unquestionably has deemed certain "medical" procedures searches. A "compelled intrusion into the body for blood" is a search. Schmerber v. California, 384 U.S. 757, 767-68, 16 L. Ed. 2d 908, 86 S. Ct. 1826 (1966). A breathalyzer test, "which generally requires the production of alveolar or 'deep lung' breath for chemical analysis," is a search. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616-17, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) (citation omitted). The collection and testing of urine, which "intrudes upon expectations of privacy that society has long recognized as reasonable," is also a search. Id. at 617; see

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cases such as Skinner, while Yin at times drives for the government, she does not drive anyone but herself.

Vernonia Sch. Dist. 47J v. Acton, 132 L. Ed. 2d 564, 115 S. Ct. 2386, 2390 (1995).

It would be utterly unsound to make the bold extrapolation from these cases that all medical examinations are searches. First, it is unclear exactly what qualifies as a "medical examination." Second, the reason certain medical procedures constitute searches is that they "intrude upon expectations of privacy" that society recognizes as reasonable. Skinner, 489 U.S. at 617. Under the court's newly fashioned rule, however, if any encounter can be labeled a medical examination, it per se is a search, "whether or not that examination entails any particularly intrusive procedures." The per se rule puts the cart before the horse. We should be cautious to outpace medical technology in this sensitive area of the law.

Since I do agree, however, that certain aspects of the routine physical examination at issue here would implicate the requisite "concerns about bodily integrity," id. at 617, I concur in the court's application of the balancing test for reasonableness, and in the result in this case. I cannot, however, concur in its dictum.

APPENDIX B

CECILIA YIN, Plaintiff-Appellant,
v.
STATE OF CALIFORNIA; DARYLL TSUJIHARA;
LINDA NICHOLSON;
ROBERT CATALE; and TONY
SUNSERI, Defendants-Appellees.

Case No. C 94-20116 JW
United States District Court, Northern District of California
October 21, 1994

OPINION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Daryll Tsujihara, Linda Nicholson, Robert Catale, Tony Sunseri, and the State of California's (collectively, "Defendants") motion for summary judgment was heard by the Court on October 7, 1994. Good cause appearing therefor, the Court GRANTS Defendants' motion, as discussed below.

I. BACKGROUND

Plaintiff brings this action pursuant to the American Disabilities Act (the "ADA"), 42 U.S.C. § 12112(c)(4)(A), 42 U.S.C. § 1983, and the United States Constitution. Plaintiff has been employed by the State of California as a tax auditor in the Employment Development Department ("Department") since June 1, 1982. She began working in the Department's San Jose District Office on August 22, 1988 as a Tax Auditor III.

Defendants allege that Plaintiff has taken over 400 hours of sick leave in 1993 and over 200 hours of sick leave in 1992. Defendants further allege that she has developed a health condition which causes dizziness and may affect her ability to drive safely during state business excursions. As a result of Plaintiff's above-average use of sick leave and her development of a health condition which may jeopardize her ability to drive while in the course of business,

Defendants have requested that Plaintiff submit to a medical examination by a physician selected by the Department.

On April 22, 1993, Plaintiff began feeling sick and experienced dizziness. Subsequently, she was transported to the hospital in an ambulance and was diagnosed the following day with a viral infection. She took approximately one and a half weeks of sick leave to recover and returned to work on May 3, 1993. On May 6, 1993, Linda Nicholson, Plaintiff's office manager, told Plaintiff she wanted copies of Plaintiff's medical records in order for the Department's Medical Director to determine whether and when she would be able to safely assume her job responsibilities. Plaintiff's supervisor, Mr. Tony Sunseri, asked her to sign a voluntary authorization for release of her medical records. Plaintiff declined to sign the release form because she believed it constituted an unwarranted invasion of her privacy.

On June 16, 1993, as a result of her above-average use of sick leave, Tony Sunseri placed Plaintiff on a driving restriction and imposed an attendance restriction requiring a physician's note for each absence due to future illnesses. Plaintiff was also informed by memorandum that the State would require an Independent Medical Examination (IME) because of her alleged dizzy spells. Another request was made that Plaintiff sign a voluntary authorization for the release of her medical records.

During a meeting on June 18, 1993 with Mr. Sunseri, Mr. Nicholson, and a representative from the California State Employees Association (CSEA), Plaintiff requested that the requirement to provide a physician's note for each illness not be applied to her use of sick leave for menstrual pain, as the management was already aware that she periodically needs to take one or two days off due to severe menstrual pain. At this meeting, EDD management asked Plaintiff to provide an updated doctor's note to cover her recurring menstrual pain. Plaintiff provided the note on or about June 30, 1993.

On July 2, 1993, Plaintiff received a memorandum from Defendant Daryll Tsujihara, Chief of the Personnel Programs Division,

again requesting that she submit to a medical examination, and indicating that failure to do so may be cause for adverse action up to, and including, dismissal. The memorandum also stated that Ms. Yin's medical examination had been scheduled for July 15, 1993.

The IME request was withdrawn in August and the driving restriction was lifted in September due to what appeared to be Plaintiff's improved medical condition. However, Plaintiff missed work for the period of October 12, 1993 through November 8, 1993. Accordingly, on January 7, 1994, a new IME request was made of Plaintiff. Plaintiff has declined to submit to a medical examination and has refused to sign a release for her medical records because she believes the examination and the release of information constitutes an unwarranted invasion of her privacy.

Defendants now move for summary judgment on the bases that Plaintiff is not covered by the ADA and that, even if the ADA does apply to her, they have the right to request an IME under the ADA. Defendants also contend that Plaintiff cannot sustain a claim for "invasion of privacy" under 42 U.S.C. § 1983 and/or the United States Constitution.

II. LEGAL STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." Celotex v. Catrett, 477 U.S. 323-324 (1986).

The moving party "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." Id. at 323. If he meets this burden, the moving party is then entitled to judgment as a matter of law when the non-moving party fails to make a

sufficient showing on an essential element of his case with respect to which he bears the burden of proof at trial. Id. at 322-23.

The non-moving party "must set forth specific facts showing that there is a genuine issue for trial." Fed.R.Civ.P. 56(e). The non-moving party cannot defeat the moving party's properly supported motion for summary judgment simply by alleging some factual dispute between the parties. To preclude the entry of summary judgment, the non-moving party must bring forth material facts, i.e., "facts that might affect the outcome of the suit under the governing law.... Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 588 (1986).

The Court must draw all reasonable inferences in favor of the non-moving party, including questions of credibility and of the weight to be accorded particular evidence. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 588 (1986); T.W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987). It is the Court's responsibility "to determine whether the 'specific facts' set forth by the non-moving party, coupled with undisputed background or contextual facts, are such that a rational or reasonable jury might return a verdict in its favor based on that evidence." T.W. Elec. Service, 808 F.2 at 631. "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587.

III. DISCUSSION

A. The ADA

The parties devote much of their argument to the issue of whether the ADA applies to Plaintiff. Defendants contend that the Act

does not apply, since Plaintiff is not disabled. Plaintiff contends that the ADA does apply because, with respect to the requirements for seeking a medical exam, the Act discusses an "employee," not exclusively a "disabled" employee. Plaintiff also assert that the Defendants certainly treat her as though he is disabled, and have offered her "reasonable accommodations" for her work schedule, as set forth in the ADA.

In determining Defendants' motion for summary judgment, the Court does not find it necessary, however, to decide whether Plaintiff is covered by the ADA. The Court, assumes, for purposes of this motion, that Plaintiff is a covered employee under the ADA. However, even based on such assumption, the Court finds that Defendants have complied with the ADA and that Plaintiff is required to submit to an examination pursuant to the ADA.

Title 42 U.S.C § 12112(d)(4) provides in pertinent part:

> A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature of such disability unless such examination or inquiry is shown to be job-related and consistent with business necessity.

Although Plaintiff contends that the Defendants here have not made such a showing of "business" necessity, the Court disagrees. The declarations of Tony Sunseri and Robert Catale set forth in detail Plaintiff's excessive absenteeism rate and the effect such absenteeism has on the workload of both Plaintiff and her office. Plaintiff's production has decreased, albeit Plaintiff's declaration attempts to attribute such decrease to factors other than her absenteeism.

Plaintiff asserts that a triable issue of fact exists with respect to the "essential functions" of her job. Plaintiff states that Defendants have not established that she is unable to drive to her field audits, nor have they established that the office has "production quotas" which Plaintiff has been unable to meet. Plaintiff requests that she be permitted to conduct additional discovery in order to allow her to

establish what are, in fact, the "essential functions" of her job. Plaintiff suggests that this motion should be postponed to allow for such discovery, however, she does not present a Rule 56(f) request for such discovery.

The Court declines to postpone this motion to allow additional discovery to be taken for two reasons. First, as noted above, Plaintiff has not complied with Rule 56(f) in making such request. Therefore, the Court can only guess as to what evidence Plaintiff may discover which would warrant the denial of summary judgment. Plaintiff's papers suggest that she would discover evidence regarding her job [sic] "essential" job functions. However, Plaintiff has been employed with Defendants for twelve (12) years. If she does not know what her job requires by now, the Court is doubtful that additional discovery will illuminate such facts.

Second, the declaration of Tony Sunseri clearly sets forth what is required of Plaintiff to perform her job. Plaintiff's declaration does not dispute such job description. In fact, Plaintiff's declaration attempts to explain why her office "goals" may not have been reached. Plaintiff does not dispute that she is required to drive a car to perform her field audits, nor does she state that she is capable of performing such task. Plaintiff also fails to respond to the fact that she is unable to perform her assigned "Auditor of the Day" tasks and that such tasks must be performed by her co-workers in her absence. In short, Plaintiff has failed to present a triable issue of fact as to what her job responsibilities are and her ability to complete such responsibilities. Therefore, the Court finds that the ADA permits Defendants, in this instance, to request that Plaintiff undergo a medical examination.

B. Section 1983/Constitution

Based upon the Court's findings, above, the Court further finds that Plaintiff has failed to present a triable issue of fact regarding her allegation that her privacy rights, as afforded by the United States Constitution, have been violated. The Court finds that the ADA permits Defendants to request that Plaintiff undergo an IME in this case.

IV. CONCLUSION

Based upon the foregoing, the Court GRANTS Defendants' motion for summary judgment.

IT IS SO ORDERED.

Dated: October 20, 1994
/s/ JAMES WARE
United States District Judge

APPENDIX C

CECILIA YIN, Plaintiff-Appellant,
v.
STATE OF CALIFORNIA; DARYLL TSUJIHARA;
LINDA NICHOLSON;
ROBERT CATALE; and TONY
SUNSERI, Defendants-Appellees.

Case No. C 94-20116 JW
United States District Court, Northern District of California
October 21, 1994

JUDGMENT

Defendants Daryll Tsujihara, Linda Nicholson, Robert Catale, Tony Sunseri, and the State of California's (collectively, "Defendants") motion for summary judgment was granted by the Court in an order dated October , 1994. Accordingly, the Court hereby enters judgment in favor of Defendants and against Plaintiffs.

IT IS SO ORDERED

Dated: October 20, 1994
/s/ JAMES WARE
United States District Judge